United States Court of Appeals
for the
District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18418

760

BERNARD C. WHITE,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

On Appeal from the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 1 1 1964

Nathan J. Paulson
CLERK

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QUESTIONS PRESENTED

1) Whether the Court erred in failing to declare a mistrial, sua sponte, when the government in cross-examination of defense witnesses repeatedly referred to defendant's criminal record although the defendant did not testify.

2) Whether the defendant is entitled to a directed verdict of not guilty by reason of insanity when substantial evidence was produced that the alleged crimes were products of a mental disease and the government's evidence in rebuttal is opinion evidence of a psychiatrist unsupported by underlying facts.

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NO. 18418

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v.

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Appellee

On Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was tried and convicted in the United States District Court for the District of Columbia upon a four count indictment charging robbery, carrying a dangerous weapon and two counts of assault with a dangerous weapon. He was sentenced to imprisonment for two to six years with an urgent recommendation by the Court that the sentence be served in an institution where the appellant would receive psychiatric treatment. Appellant filed a notice of appeal and the Court granted him leave to proceed in forma pauperis.

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STATEMENT OF THE CASE

With regard to the offenses charged the government presented its case through the testimony of Louis Blumenthal, and Thomas Nagle, the alleged victims and Private John R. White, Metroplitan Police Department.

Mr. Blumenthal, the owner and operator of a clothing store at 611 Pennsylvania Avenue, S.E., Washington, D.C. testified that at approximately 6:00 o'clock P.M. on April 18, 1963, he was in his store, alone when a man, whom he identified as appellant, entered his store and, without saying anything, (Tr. 20 & 34), began beating the witness about the head and body. The assailant then fled into the street. The witness attracted the attention of a passerby, Thomas Nagle, who pursued the alleged assailant. Mr. Blumenthal returned to his store and later noticed that the cash register was open and a small amount of money was missing.

Mr. Nagle testified that he pursued the alleged assailant , whom he identified as appellant, until the alleged assailant turned and fired a gun in his direction (Tr. 37).

Private White testified that he responded to a report of a robbery and several hours later arrested the appellant at his wife's uncle's in the District of Columbia. Upon arrival at the apartment he was admitted by Mr. Combs, the occupant of the apartment, and

observed the appellant and appellant's wife sleeping on a mattress on the floor. He awakened appellant and advised him he was being placed under arrest for robbery. He searched the area around the mattress and found a revolver. He stated appellant admitted the crime but stated he hadn't meant to hurt anyone and didn't know what happened or why he did it (Tr. 51). He stated the appellant was taken to Casualty Hospital where appellant apologized to Mr. Blumenthal and stated further, he didn't mean to do it (Tr. 52).

Appellant did not testify in his defense but on the issue of appellant's sanity, the defense called (a) Dr. Dorothy S. Dobbs, Staff Psychiatrist , St. Elizabeths Hospital (b) John F. Borriello, Clinical Psychologist, St. Elizabeths Hospital (c) Dr. Charles Frederick Aglar, Staff Psychiatrist, St. Elizabeths Hospital.

(a) Dr. Dobbs testified she saw the appellant on two occasions. The first time was on the occasion of a medical staff conference on August 29, 1963,and the second occasion was on September 5,1963. The witness testified that at a staff conference the past history as obtained from the appellant was presented. Further, a psychologist presented the results of a number of psychological tests with their conclusions. A social worker presented the results of one or more interviews with the family. And then, the patient was called into the room and interviewed for approximately forty-

five minutes. After the patient left the room there was a discussion among the physicians as to their respective findings.

Dr. Dobbs testified it was her opinion that the appellant at the time of her last contact with him as well as on April 18, 1963, was suffering from a mental disease which she would characterize as schizophrenic reaction, chronic undifferentiated type (Tr. 75).

The witness testified that the appellant discussed with the physicians the events of April 18, 1963, and explained he thought Mr. Blumenthal was laughing at him and that he had the feeling on many other occasions that people looked at him in a strange way and laughed at him. The doctor testified that this was very typical of the schizophrenic patient and many of them, given this set of circumstances will act on this belief. (Tr. 78).

The witness testified further as follows: (Tr. 82-83)

> " I have met some angry people in my life, but Mr. White is above and beyond what I would call within normal limits in his profound hatred for almost everyone; not just police or authority, but everyone, which is related to an overall disturbance in his thinking and judgment which we often see in schizophrenics. More specifically, they would be related in terms of his perception of Mr. Blumenthal laughing at him, making fun of him, to explain why he at that particular moment went into this particular store, and why he would make an unprovoked brutal assault on a man who had done him no harm whatever.

> Finally, it is related in terms of Mr. White's own report to us of his experiencing such enormous inner tension and the only thing that relieves his tension is physical violence, hurting someone; in other words, quite a sadistic streak in him".

Dr. Dobbs testified that the offenses were a product of the appellant's mental illness (Tr. 82).

In crossexamination by the Government Dr. Dobbs stated (Tr.100) the appellant had expressed ideas of hatred , killing and suicide. The doctor testified (Tr. 110) there was a history of suicidal attempts. The doctor (Tr. 105) stated that nursing notes contained entrys that appellant (a) paced the floor and beat the wall with his fists. These notes also described the appellant as extremely tense and confused (Tr. 105).

Dr. Dobbs was questioned concerning the possibility that the appellant was malingering. The doctor testified on this point as follows (Tr. 107).

> " In my opinion he was doing very little, if any. Whether he was or not I still believe him to be mentally ill.

In crossexamination of Dr. Dobbs the Government repeatedly referred to the appellant's apparent criminal record (Tr. 87, 88, 99, 108, 109).

Upon redirect, Dr. Dobbs testified that the outlook for appellant from the psychiatric view point was no better than fair

and his prognosis is guarded (Tr. 110). Further, the doctor regarded the appellant as dangerous both to himself and to others (Tr. 110).

(b) John F. Borriello, clinical psychologist at St. Elizabeths Hosptial, testified in regards to a psychological evaluation of appellant made while appellant was a patient at St. Elizabeths Hospital. The evaluation consisted of giving several standardized tests which are given throughout the country in mental hospitals and psychological clinics. The tests were identified as follows: (Tr. 122)

(a) Wechsler Adult Intellegence Test- a test that is given in order to determine the intellectual function of the individual.

(b) Wechsler Memory Scale- a test which is given in order to determine and assess the memory function of an individual.

(c) Bender Geslalt Test- a test that is given in order to determine the visual motor functioning and also it tells the psychologist something about personality dynamics, something about what the person is.

(d) Rorschach Test- a test given to determine what the person is, his personality, and it tells about his personality.

(e) House, Tree, Person Test- tells something about the personality of the individual.

As a result of these tests the witness testified his opinion in regards to psychological evaluation of the appellant was that the results of the tests were consistent with a schizophrenia reation chronic undifferentiated type. The results indicated that Mr. White's intellectual functioning tested in the dull normal range and he had a potential that was average. Also, the tests indicated he was hostile and that he possessed poor emotional control, so under minimum stress he would act irrationally and impulsively in an aggressive fashion. Also, the overall results indicated he should be considered as dangerous, both to himself and to others. (Tr. 123- 124).

(c) Dr. Charles Frederick Aglar, Staff Psychiatrist at St. Elizabeths Hospital was called by the defense and testified it was his opinion that appellant was suffering from a paranoid schizophrenic illness at the time of the staff conference and most probably at the time the charge was made against him. (Tr. 180). He further testified that he (appellant) felt the man (Blumenthal) was laughing at him, that his attack was on the basis of paranoid schizophrenia illness (Tr. 183).

The witness on crossexamination was asked whether he had discounted the possibility of malingering. His reply was as follows: (Tr 200).

> "I haven't discounted it. It is just weighing the evidence as I see it. I think it is more heavily weighed in the direction of his having been so at the time. And I think the things that make me feel that way is his past history and previous past adjustments, and his appearance at the hospital and on psychological testing, and also the description of the beating is rather bizarre to me."

The witness further testified on this point as follows:

(Tr. 201)

> "I didn't see anything in him that made me suspicious of malingering."

The Government on rebuttal called Dr. David J. Owens, Staff Psychiatrist, St. Elizabeths Hospital.

He testified:

(a) He was present at the staff conference on August 29, 1963. considering the case of appellant.

(b) That this occasion was the first time he had seen the appellant.

(c) That at the conference a psychological summary was presented to the conference members.

(d) That following this, psychological examinations were given by the psychologists.

(e) That following this, a social service report was given by the social worker, and finally, the patient was interviewed.

(f) That at this point the witness arrived at his opinion (Tr. 212)

The witness admitted that at the time of the examination the appellant was under medication, to-wit, a tranquilizer known as Thorzene (Tr. 212)

The witness further testified that as a result of the aforesaid conference it was his opinion that the patient was malingering (Tr. 213)

Dr. Owens testified that , because the patient was on a large dosage of tranquilizers, and because of the difference of opinion between the witness and the other staff members, it was decided that they would withdraw the tranquilizers to determine the patient's condition without the medication. They next examined the patient on September 5, 1963. The witness testified (Tr. 213) there was very little difference, in his opinion, between the patient's participation at the first staff conference and his participation at the second staff conference. The degree of difference was not explored but the witness arrived at the opinion that the patient was without mental disorder. (Tr. 214)

The witness was questioned with regard to the basis for his opinion and he testified:

(a) He had noted a sympton of mental disease, to-wit,

hositility. (Tr. 214)

(b) However, he was alerted to a possibility of a history of malingering by reason of a District of Columbia General Hospital record of 1956.

When inquiry was made with regard to whether the witness was able to confirm by reason of nurses notes or doctors notes, suspicions of malingering on the part of the patient, the witness testified there were two reasons to support his opinion, the main reason (Tr. 215) being:

> "I think they did.------- one of the main reasons was the description he gave of hallucinatory experiences, or the hearing of a voice that he said he was hearing."

The witness further testified that the experience related was not, in his opinion, consistent with the voice that a schizophrenic usually would hear. In this regard the witness testified as follows: (Tr. 215-216)

> " He described hearing only two things said to him, and it was basically he heard a voice say 'Rob and Kill'
> That these voices had been present since childhood, but he did not describe them to other individuals and, in all likelihood, had he been hearing voices since childhood, somebody, somewhere along the way, would have heard about them."

The second reason advanced by the witness as evidence of malingering was that information obtained from the patient's wife with regard to the relationship between the wife and the patient was inconsistent with that stated by the patient (Tr. 216, 218) in that the patient stated he did not get along with his wife and

had problems and difficulties with her. The witness testified, the information obtained from the wife was to the effect that the patient placed his wife on a pedestal and believed his wife could do no wrong (Tr. 218). The witness further testified (Tr.218)

> " --- the information I was getting from the patient was not consistent with what - - - at least something was wrong somewhere".

This witness admitted that the patient upon admission to St. Elizabeths Hospital was placed on tranquilizers; that he was first on Equanil but was changed to Thorzene. The witness testified (Tr. 228)

> " Thorzene is much stronger. It is a much heavier tranquilizer."

The witness admitted that the hospital records contained nurses' notes to the effect that the patient, upon admission, was"restless and confused." He stated that such notes were not necessarily unusual but that <u>to him</u> they indicated the individual was merely tense, and uncomfortable.

The witness admitted that a hospital admission note was to the effect that the patient was disoriented as to time and place (Tr. 233). The witness disconnted said note.

The witness admitted he was informed of suicidal attempts by patient (Tr. 238) but stated he had forgotten the details (Tr.238)

but was not impressed that it was a serious attempt to commit suicide.

The witness stated he did not see the patient while the patient was on the ward and normally would rely on nurses'notes (Tr. 241) --- he discounted the nurses' notes but admitted that said nurses' notes did not contain any reference to the possibility that the patient was malingering (Tr. 242)

The witness stated further that under enough stress or pressure anyone could become psychotic (Tr. 245) Further, in regard to the appellant there was evidence he was a potential schizophrenic (Tr. 245).

The witness testified on re-direct that the hospital record indicated a strip of sheet rope was found in patient's possession on a "shake-down" inspection. Further, that an attendant's note indicated the patient tried to commit suicide (Tr. 255) and as a result, the patient was removed to a room where he would be kept under observation. The witness testified he did not even consider this as a suicidal gesture and it was his opinion the patient had the rope in order to escape.

STATEMENT OF POINTS

1) The District Court erred by not declaring a mistrial, sua sponte, when the government repeatedly referred to appellant's criminal record although the appellant was not called as a witness.

2) The District Court erred in not granting appellant's motion for a directed verdict of acquittal because the evidence concerning appellant's mental condition was such as to compel a reasonable juror to entertain a reasonable doubt as to appellant's responsibility for the acts constituting the alleged crimes.

SUMMARY OF ARGUMENT

1) The government should not have been permitted to introduce, in effect, the appellant's criminal record indirectly in cross-examination of defense witnesses when the appellant was not called as a witness.

2) Appellant's motion for a directed verdict should have been granted because of the failure of the government to carry its burden of proving beyond a reasonable doubt that the offenses with which appellant was charged were not the product of a mental disease.

ARGUMENT

1) Evidence that appellant had a criminal record was first introduced into the trial by the government in cross-examination of defense witness Dr. Dobbs. The question propounded was (Tr. 87)

> " Do you know of anything or did you learn of anything of his home life; that is, prior to getting involved at the age of ten, I think you said, in difficulties with the law."

The government probably had reference to the previous testimony of the witness who stated, in response to a question propounded by defense counsel, (Tr. 73):

> " He (appellant) discussed with us the charge which was pending against him at the time. He discussed with us many of his prior difficulties which had lead to his being locked up in various institutions almost all his life, from the age of ten, I believe it is."

However, this response did not mention anything about the appellant having difficulty with the law. The fact that the witness mentioned that appellant had been locked up in various institutions did not necessarily mean that the appellant began violating the law at the age of ten. Perhaps the government had thought that appellant's attorney had "opened the door" to this line of questioning by reason of appellant's interrogation of the witness Dobbs.

The government next injected into the trial the criminal record of appellant when the following question was put to Dr. Dobbs. (Tr. 88)

> " And you said he did spend most of his younger days until recently incarcerated or in an institution".

The government again suggested the appellant had a criminal record on cross-examination of Dr. Dobbs with the following question (Tr. 99)

> " Now Doctor, are you able to point to anything at all in the defendant's lifetime other than the fact that he got into trouble, assumedly with the law, are you able to point to anything and say that is an indication of diseased mind."

Again, in cross-examination of Dr. Dobbs the government asked the following question (Tr. 108)

> " One other thing. Wouldn't it be fair to say this man coming as he does from a broken home, having received no parental guidance,discipline, and family adjustment, and whom assumedly got in bad company along the way, and who found himself in an endless string of difficulty with the law, and who perhaps consequently and perhaps justifiably, built up a tremendous hostility towards society and law enforcement generally, wouldn't it be fair to say his problem is not so much mentally sick as it is being maladjusted, mean, hostile? Wouldn't it be fair to say that than to say he was an insane man."

The final reference by the government, in cross-examinations of Dr. Dobbs, to appellant's criminal record was in the following

question (Tr. 109):

> "If he had not been in prior difficulty with the law, prior to this present difficulty; if he always either managed to escape or didn't get caught, but other than for that he remained basically the same person would your opinion change then; or isn't your opinion Doctor, to put it another way, based mostly on the fact that for years he has just told society in effect he doesn't care?"

There were later references to appellant's criminal record in cross-examination of defense witnesses by the government. It would seem obvious that continuous reference to appellant's criminal record under the circumstance was improper and grossly prejudicial to appellant's case. It is not contended that it would greatly affect the consideration by the jury of appellant's guilt or innocence. It is contended that the question of whether or not appellant was malingering would be influenced by the belief that appellant was a hardened criminal. It would appear that the government's purpose was to establish such a belief with the design of influencing the minds of the jury on the question of malingering.

Unfortunately, appellant's counsel is unable to find in the transcript any evidence of an objection or protest to the government's line of questioning. However, under the circumstances of this case it would appear and it is now contended that the

Court should have declared a mistrial sua sponte.

ARGUMENT

11) Appellamt moved for a directed verdict of acquittal after all the evidence was in (Tr. 265). It is the position of appellant that the motion should have been granted because the weight of the evidence in regards to the question of appellant's insanity was overwhelming and should certainly compel a reasonable juror to have a reasonable doubt as to appellant's sanity.

Dr. Dorothy Dobbs was one of three expert witnesses called by the defense and stated she had interviewed the appellant on at least two occasions, had studied the reports of social workers as well as that of a psychologist. She had considered appellant's background or history, and stated it was her opinion that the appellant was, at the time of the interviews and at the time of the alleged crime suffering from a mental disease which she characterized as schizophrenic reaction, chronic undifferentiated type (Tr. 75). This doctor further testified that the offenses charged were a product of the appellant's mental illness. (Tr. 82)

This witness did not merely state conclusions unexplained and unsupported by facts but, to the contrary, supported the stated conclusions at many places in her testimony including that part of her testimony to the fact that appellant had expressed

ideas of hatred, killing and suicide. (Tr. 100) She further testified that appellant,while under treatment at Saint Elizabeths Hospital, was observed pacing the floor, beating on the walls with his fists and was considered by nursing attendants to be tense and confused. (Tr. 105)

When questioned concerning the possibility that appellant was malingering the doctor testified there was little if any evidence to support this and further, regardless of same the appellant, in the doctor's opinion, was mentally ill.

John F. Borriello, the second of the three expert witnesses to testify in behalf of the appellant stated he was a clinical psychologist at Saint Elizabeths Hospital and had participated in a psychological evaluation of appellant.

He testified in considerable detail as to the types of tests given appellant, the purposes of said tests and the conclusions derived therefrom.

He stated the tests included: (a) The Wechsler Adult Intelligence Test (b) The Wechsler Memory Scale (c) The Bender Gestalt Test (d) The Rorschack Test (e) The House-Tree-Person Test.

He testified that the results of the tests were; (a) consistent with a schizophrenic reaction, chronic undifferentiated

type; (b) that appellant was hostile and possessed poor emotional control so that under minimum stress he would act irrationally and impulsively in an aggressive fashion; (c) that appellant should be considered dangerous to himself and others (Tr. 123, 124).

Dr. Charles F. Aglar, Statff Psychiatrist, Saint Elizabeths Hospital was the final witness called by the defense and testified it was his opinion that defendant is and probably was on the 19th of April 1963 a paranoid schizophrenia. (Tr. 186) i e a person who suffers from a severe mental illness characterized by disturbances in thinking, a tendency to have hallucinations and delusions and further characterized by feelings that other people bear hostile ideas and hostile intent toward the patient (Tr. 187) He also testified the offenses were a product of the disease (Tr. 195).

The witness explained in detail the basis for his opinion, in his review of various reports and the patient's history. He stated on cross-examination that there was evidence in the appelant's history which indicated a gradual deterioration. His testimony in this regard was: (Tr. 188)

> " I think anybody who runs away from home at the age of ten, and particularly to the extent it comes to the attention of the authorities, is a very disturbed child. And I think its poor adjustments in the institutions that he was cared for shows he probably has been ill for a long time. He has never been psychotic prior to all this, but it seems to me that the overall picture would appear to be one of gradual deterioration of the personality and adjustment.

This doctor further testified that other evidence supporting his opinion was the appellant's history of poor behavior at various institutions and bedwetting. (Tr. 192) The latter sympton the doctor described as a fairly severe sympton of a disturbance in a child when it extends into the further adolescent years as was the case with appellant.

He stated that this sympton is frequently found in people who later become quite sick (Tr. 192).

When inquiry was made with regard to appellant's conduct in various institutions the doctor stated: (Tr. 192)

> " He was considered very tense, a poor student, and not getting on well with the other fellows, and he bullyed the younger or the smaller fellows, which is also a symptom of a severe emotional disturbance in some cases.
>
> Any boy may bully a younger child from time to time, but a boy who makes a habit of it generally has some need to do it in order to maintain his own self esteem.

The doctor stated further, on cross-examination, that the patient had a grudge against his wife and this grudge was part of his illness (Tr. 196); that the patient had expectations of his wife that were far beyond her capacity i e to be a good and loving wife, which apparently she was not as the wife had admitted to the social worker that she was an entertainer and had a number of people who would take pretty good care of her. (Tr. 197)

The witness expressed the opinion that the psychological tests

as administered at Saint Elizabeths Hospital are quite important and usually quite accurate (Tr. 204); but, his diagnosis would have been the same in the absence of psychologist's reports. (Tr. 205)

There can be no doubt that the decision rendered in the case of Davis v. United States, 160 U.S. 469 established that when substantial evidence of insanity has been presented, it becomes the burden of the Government to introduce sufficient evidence so that a jury might find beyond a reasonable doubt that the defendant's actions were not the product of insanity. Appellant submits that substantial evidence of insanity was presented and that the Government did not sustain the burden imposed by law.

In an effort to sustain its burden the Government called in rebuttal Dr. David J. Owens, Staff Psychiatrist, St. Elizabeths Hospital.

The witness testified he had examined the patient at St. Elizabeths Hospital, had reviewed the reocrd and had concluded he did not see sufficient signs or symptons of mental disease to warrant a diagnosis of mental illness. (Tr. 214) He admitted the patient has shown certain symptons of mental disease, the main sympton being that the patient showed considerable hostility directed toward authority figures. (Tr. 214)

The government lead the witness into an opinion of malingering by the patient.

The witness testified he was alerted that accused had feigned a mental illness at District of Columbia General Hospital in 1956. There was no elaboration on the conclusion evidently set out in the District of Columbia General Hospital record; no inquiry was made as to who formed the conclusion i e whether or not the conclusion was reached by a qualified peron; the circumstances and basis for said conclusions were not explored, However, this so called history played an important role in Dr. Owen's opinion, if not the most important role.

This witness supported his theory of malingering by testifying that the patient stated he had been hearing voices, since childhood, telling him to "rob and kill". However, the doctor evidently did not believe the patient becuase, he stated, " had he been hearing voices since childhood somebody, somewhere along the way, would have heard about them" (Tr 216). However, there was no evidence that the history did not contain a record of patients having heard voices "somewhere along the way"; there was no evidence that this doctor had troubled to inquire of the various institutions regarding patient's record; indeed, there was no direct evidence that this witness had reviewed institution records available.

By his testifying that the patient's description of his relationship with his wife did not coincide with the report obtained

from the wife i e the patient reported that he did not get along well with his wife, and that he had problems and difficulties with her whereas it was allegedly the wife's version that the patient was very friendly. (Tr. 218) Evidently, the witness chose to believe the alleged version of the wife without explaining why, although apparently expressing some doubt as to which version should be accepted, when he stated

> ' - - - at least something was wrong somewhere".
> (Tr. 218-223)

The witness obviously was not aware of the reports of the social worker (or chose to ignore same) to the effect that appellant's wife was not a good and loving wife and in fact had informed the social worker that she was an entertainer and had a number of people who would take pretty good care of her. (Tr. 197) The witness obviously attached importance to alleged inconsistent statements but later in his testimony (Tr. 221) testified that inconsistent statements may be indicative of mental illness.

The witness was unable to explain or account for the patient's past problems and so stated by describing him as an individual "who certainly has had a difficult life, for some reason which I am unaware of, but at least we know that he is a very hostile, a very angry individual - - - - (Tr. 219).

The witness admitted that the patient upon admission to the hospital was placed on tranquilizers and that it was necessary at a later date to increase the dosage i e to use a much stronger degree of drug. The witness did not explain the reason for the use of the drug or for the increase in dosage.

Notes made by nurses upon patient's admission to the hospital to the effect that the patient was restless and confused and disoriented were discounted by the witness without logical explanation.

The witness admitted that the hospital record contained references by nurses and attendants to the effect that the patient, at various times,

(a) was disoriented as to time and place (Tr. 233)

(b) was quite tense when questioned (Tr. 235)

(c) gritted his teeth (Tr. 235)

(d) paced the halls, displayed an anti social personality, would only converse when asked a question (Tr. 236)

(e) paced the hall on numerous occasions, was unable to sleep at night, was noisy during the night, was restless and confused, slept with a towel tied around his face, normally incoherent, occasionally hits the walls, (Tr. 237-238)

The witness discounted all these hospital record entries without troubling himself to confer with the persons making said notes. The witness chose to interpret this action on the part of the patient as part of the patient's plan to malinger, and thus the witness chose to completely disregard the judgment of trained nurses and attendants without any explanation although at the same time admitted that psychiatrist must rely heavily on attendant's notes (Tr. 241, 258) and that said notes did not contain any opinions that patient was malingering. (Tr. 242)

The witness admitted he was informed of a history of suicide attempts by patient prior to patient's admission to St. Elizabeths Hospital. He stated he was further informed that a strip of sheet was found in patient's possessions while at St. Elizabeths Hospital on a shake down inspection and that an attendant's note indicated patient tried to commit suicide (Tr. 255). Further, the notes reported the patient was removed to a room where he could be kept under observation.

Without any evidence that the witness took the trouble to confer with the attendant or nurse, he simply disregarded the importance of same and concluded, without any apparent basis in fact, that the patient had the rope in order to attempt to escape. The

The witness discounted all these hospital record entries without troubling himself to confer with the persons making said notes. The witness chose to interpret this action on the part of the patient as part of the patient's plan to malinger, and thus the witness chose to completely disregard the judgment of trained nurses and attendants without any explanation although at the same time admitted that psychiatrist must rely heavily on attendant's notes (Tr. 241, 258) and that said notes did not contain any opinions that patient was malingering.(Tr. 242)

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Without any evidence that the witness took the trouble to confer with the attendant or nurse, he simply disregarded the importance of same and concluded, without any apparent basis in fact, that the patient had the rope in order to attempt to escape. The

record apparently is completely devoid of any evidence that the patient ever attempted an escape!

The witness admitted that the appellant is a potential schizophreneia. (Tr. 244,245,246)

Of interest is the testimony of Dr. Owens that his opinion regarding absence of mental disease was reached on September 5, 1963, and yet the Court record contains a letter from Dr. Cameron, Superintendant of St. Elizabeths Hospital wherein it is stated that it is the opinion of the hospital that Bernard C. White is suffering from a mental disease, Schizophrenic Reaction, Chronic Undifferentiated Type. Apparently a copy of this correspondence was sent to court appointed attorney, Walter Hansen. It appears obvious that Dr. Owens' opinion was not dependant on the material available. Further, it appears he failed to explain the material if any upon which he did rely and how he progressed from his material to his conclusion. This failure to explain would appear to violate the advice set out in <u>Carter</u> v <u>United States</u>, 102 U.S. App. DC 227 where the Court at 236 stated:

> " The chief value of an expert testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusions; - - - ".

Since the government failed to meet its' burden a verdict of not guilty by reason of insanity should have directed upon motion of trial counsel at the conclusion of the evidence. This course was recommended in the case of <u>Isaac</u> v <u>United States</u>, 109 US DC 34 where it was held that in a case where it appeared at the close of all the evidence that a reasonable mind must necessarily have had a reasonable doubt as to the sanity of the accused, the trial judge should direct a judgment of acquittal by reason of insanity. See also <u>McDonald</u> v <u>United States</u>, 114 US App DC 120, 123.

CONCLUSION

It is the position of the appellant that the judgments should be reversed and the cause remanded with instructions to enter a judgment of not guilty by reason of insanity or for a new trial.

Respectfully submitted,

Charles C. Collins

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,418

BERNARD C. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOHN H. TREANOR, JR.,
JOHN R. KRAMER,
Assistant United States Attorneys.

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 13 1965

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Does reference by the prosecutor to appellant's prior difficulties with the law in cross-examination of appellant's expert witnesses constitute reversible error where appellant's history of institutionalization is highly probative on the sole disputed issue of appellant's sanity and minimally prejudicial in the absence of specific evidence of other crimes committed by appellant and where appellant acknowledged the value to his case of his background of misconduct leading to incarceration by initiating mention of it?

2) Did the trial court err in failing to direct a verdict of not guilty by reason of insanity where there was conflicting expert testimony as to whether appellant was suffering from a mental disease or defect at the time of the offenses?

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OTHER REFERENCES

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,418

BERNARD C. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted, tried by jury, convicted, and sentenced to imprisonment for a period of two to six years on four counts, one of robbery in violation of 22 D.C.C. § 2901, two of assault with a dangerous weapon in violation of 22 D.C.C. § 502, and one of carrying a dangerous weapon in violation of 22 D.C.C. § 3204. This appeal followed.

The testimony established that on April 18, 1963, at approximately 6 P.M., appellant entered the El-Bee Clothing Store located at 611 Pensylvania Avenue, S.E. and beat the store's owner, Louis Blumenthal, on the head with a gun, giving Mr. Blumenthal head injuries sufficient to keep him in the hospital for six days (Tr. 16-22). Mr. Blumenthal ran out of the store after appellant. When he came back, he noticed that his cash drawer was open and empty where twenty to forty dollars had been before and that two dollars were lying on the floor (Tr. 20-21). As appellant ran out of the store he went past Thomas Nagle, who chased after him, only to stop when appellant turned and fired a shot at him with a gun (Tr. 37, 41).

The defense did not deny that appellant committed all of these acts (Tr. 66). Rather the defense contended that the acts were products of appellant's mental illness (Tr. 67, 282-287). To prove that appellant was suffering from a mental disease or defect on April 18, 1963 which caused him to commit the unlawful acts the defense put two psychiatrists and one psychologist from St. Elizabeths Hospital on the stand. Dr. Dorothy Dobbs, staff psychiatrist, testified that, on the basis of her observations of appellant at two staff conferences on August 29 and September 5, 1963 and her perusal of his records, tests, and history, she was of the opinion that, on April 18, appellant was suffering from a schizophrenic reaction, chronic undifferentiated type (Tr. 70-75). She was able positively to identify in appellant only one of the five characteristics of schizophrenia—flattened affect (Tr. 75-76). The others—loosened association, autism, hallucinations, and delusions—were either not striking, uncertain, or of dubious validity (Tr. 76-77). Dr. Dobbs felt that, if appellant had been giving an accurate report of his mind when he informed the doctors that he went in to get Mr. Blumenthal because he believed Blumenthal was laughing at him, then the beating, at least, was a product of his illness (Tr. 82, 94), although profit motive and the normal desire not to get caught might possibly account for the subsequent robbery and shooting (Tr. 80, 95-97). Dr. Dobbs realized the possibility that appellant was concocting the laughing story and malingering when he agreed to having dreamt all the dreams suggested to him by the doctors, including irrelevant ones (Tr. 78, 84-87, 90), but was ultimately of the conclusion that, even if he did malinger, he was, nonetheless, mentally ill (Tr. 107-108).

Dr. John Borriello, staff clinical psychologist, considered appellant's case at arm's length, merely reviewing the reports from his intern of the results of a series of five tests administered to appellant and of appellant's reactions (Tr. 138, 151-152, 168). Dr. Borriello's diagnosis coincided with that of Dr. Dobbs (Tr. 123). He saw no signs of malingering (Tr. 136-138, 168).

Dr. Charles Aglar, another staff psychiatrist, testified that appellant was probably suffering from paranoid schizophrenia at the time charges were placed against him (Tr. 180), stressing that he could be wrong (Tr. 206). He did not discount the possibility that appellant was malingering, but found that the evidence available to him was more heavily weighed in the direction of psychosis than trickery (Tr. 200-201, 204). He admitted that it was easier to explain the attack on Blumenthal than the taking of the money and shooting in terms of appellant's mental disease (Tr. 184-185, 199-200), noting the possibility that robbery was in the same causal class as the beating and guessing that the shooting was a rational act engendered by normal fear of capture (Tr. 185, 199-200). Dr. Aglar, like Dr. Dobbs, relied heavily on appellant's story of thinking he was being laughed at to connect his illness with his crime (Tr. 184).

In rebuttal the Government offered Dr. David Owens, the supervisor of appellants' three experts at the John Howard Pavillion in St. Elizabeths (Tr. 85, 211). Dr. Owens had been present at the staff conferences and had, in fact, conducted most of the interviewing (Tr. 72). His opinion was that appellant was malingering, faking symptoms of mental illness, feigning disorientation, contriving false suicide attempts, inventing voices (Tr. 213-218, 233-

234, 239, 249, 255). Dr. Owens saw appellant as an angry, hostile individual, who, like everyone, was a potential schizophrenic (Tr. 219, 245-246), but who, at the time of the offenses, was not suffering from mental disease and had no symptoms that are not shared by everyone from time to time (Tr. 214, 249).

SUMMARY OF ARGUMENT

I

Reference by the prosecutor to appellant's prior difficulties with the law in cross-examining appellant's psychiatrist and psychologist witnesses was proper where the witnesses' knowledge and evaluation of appellant's history of institutionalization was substantially relevant in appraising their testimony on the sole disputed issue of appellant's sanity, minimally prejudicial to appellant in the absence of specific evidence of appellant's previous misconduct, and even desirable in appellant's eyes as indicated by his efforts to spread his past on the record in direct examination of the same witnesses.

II

The trial court properly declined to direct a verdict of not guilty by reason of insanity where there was expert evidence that appellant was not suffering from a mental disease or defect at the time of the crimes to be weighed by the jury against expert evidence to the contrary.

ARGUMENT

I. Prosecution reference to appellant's past was proper.

(Tr. 72-73, 87-88, 99, 108-109, 138, 162, 164, 167, 178, 187-189, 192-193, 201)

Appellant contends that the trial court should not have permitted the Government to introduce evidence of his criminal record by cross-examining his psychiatrist and psychologist witnesses about his past and that the trial court's failure to declare a mistrial sua sponte predicated on this line of questioning constitutes reversible error. Appellant refers not to any citations by the Government of particular crimes with which he had been charged (none were mentioned by the prosecutor), but to the Government's asking each defense expert to comment on the relevance of appellant's prior difficulties with the law (Tr. 87-88, 99, 108-109, 138, 162, 164, 187-188, 192-193, 201). Appellant below sat mute while each such question was posed and each answer received. An appellant who failed to register even the meekest protest at these references to his life of maladjustment at trial cannot roar with outrage on appeal. See, e.g. *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Fuller* v. *United States*, 53 App. D.C. 88, 91, 288 Fed. 442, 445 (1923).

Appellant was not merely nonchalant below about the introduction of this "grossly prejudicial" (Br. 15) evidence, he affirmatively invited it by broaching the subject to Dr. Dorothy Dobbs and "kindly" requesting her to "tell the jury what this [patient's] history consisted of." (Tr. 72). Dr. Dobbs kindly obliged him by informing the jury that appellant had "many of his difficulties which had lead [*sic*] to his being locked up in various institutions almost all of his life, from the age of ten . . ." (Tr. 73).

What, Dr. John Borriello, was the patient's response to the house in the House Tree Person test, asked appellant (Tr. 166)? "On the house, it is a prison or jail or a place of confinement or a sanctuary. Thirty years old, and pretty strong. It held me for 20 years out of 28 years." (Tr. 167). "Thank you, Doctor," said appellant.

"Will you [Dr. Charles Aglar] tell the Court and the members of the jury, please, what the history was as given to you concerning this patient?" (Tr. 178). The answer came: "He was in a great deal of trouble as a child and he was under the jurisdiction of the Department of the Public Welfare in 1944, when he was only 10 years old, because he was a juvenile from his parents.[1] And he was subsequently incarcerated in an industrial home school for three years. After his release from there, he was in various institutions for a large part of his life, up until now, because of car stealing and other types of theft." (Tr. 178-179).

At no time did appellant abandon his efforts to have the jury learn about his past. An appellant who refers to or elicits by examination evidence of his own prior bad conduct has no recourse on appeal to rectify what in retrospect appears to him to have been a tactical error. *Lurk* v. *United States*, 111 U. S. App. D. C. 238, 296 F.2d 360 (1961) *aff'd sub nom. Glidden* v. *Zdanok*, 370 U.S. 530 (1962) (defendant's counsel responsible for indicating to jury that defendant was once a prison inmate); *Felton* v. *United States*, 83 U.S. App. D.C. 277, 170 F.2d 153, *cert. denied*, 335 U.S. 831 (1948) (defense counsel elicited testimony of other crime in cross-examination); *Dear Check Quong* v. *United States*, 82 U.S. App. D.C. 8, 160 F.2d 251 (1947) (defendant volunteered evidence of prior conviction); *Young* v. *District of Columbia*, 102 A.2d 754 (1954) (defense counsel elicited testimony on defendant's record in cross-examination).

Appellant's approach below is understandable and was even advisable in light of this Court's constantly reiterated request that expert psychiatric witnesses amplify their conclusions by explaining in detail the basis for them, including their knowledge of the specifics of the patient's background. See, e.g. *Rollerson* v. *United States*, No. 17,675, decided October 1, 1964; *Jackson* v. *United States*, No. 18,225, decided August 7, 1964 (Bazelon, C. J., concurring); *Hawkins* v. *United States*, 114 U.S. App. D.C. 44, 310 F.2d 849 (1962). "The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned . . ." *Carter* v. *United States*, 102 U.S. App. D.C. 227, 236,

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[1] Paragraph break in transcript elided.

252 F.2d 608, 617 (1957). The data for decision that the psychiatrists should provide should include information on the what and when of past episodes of confinement according to *Jackson, supra,* the entire criminal history of appellant, according to *Williams* v. *United States,* 114 U.S. App. D.C. 135, 312 F.2d 862 (1962) *cert. denied* 374 U.S. 841 (1963). Indeed, although repeated anti-social conduct, criminal or otherwise, is not tantamount to mental disease or defect per se, *Williams, supra,* MODEL PENAL CODE § 4.01(2) (Proposed Official Draft, 1962), it is, at least, some evidence thereof (Tr. 188-189)[2].

Appellant's history of constant difficulties with the law was, however, a sword of two-edged relevancy, having probative value in establishing or clarifying the insanity defense (Dr. Dobbs in cross-examination stated that "if you ask me to consider Mr. White without a background history of breaking the law, I would have to answer in this way. Mr. White, without a good portion of his background, is an individual I haven't met, haven't examined, and couldn't comment upon," Tr. 109) while, at the same time, providing a foundation for the Government's theory that appellant was a sane, albeit maladjusted, criminal smart enough to have learned how to malinger and invent useful symptoms. It is precisely the significant probative impact of appellant's history of incarceration in aiding the prosecution to satisfy its burden of proving beyond a reasonable doubt that appellant was sane at the time he committed the offenses charged that makes the use of this history by the prosecution during cross-examination proper as a matter of the law of evidence.[3]

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[2] If, as all the cases from *Carter, supra,* on indicate, lay witnesses to abnormal acts on the part of a defendant may testify as to their observations since abnormal acts have probative value on the issue of sanity, how much more probative are expert evaluations of criminal acts which are abnormal enough to require social controls.

[3] Since appellant makes an attack on the sufficiency of the Government's evidence to overcome his directed verdict motion, it

The rule in the District of Columbia, as in nearly every other jurisdiction, is that evidence of other offenses committed by a defendant is admissible when it is substantially relevant to establish defendant's guilt other than by showing that defendant has a propensity to commit crime or a criminal character deserving of punishment. *Harper* v. *United States*, 99 U.S. App. D.C. 324, 325, 239 F.2d 945, 946 (1956); *Fairbanks* v. *United States*, 96 U.S. App. D.C. 345, 347, 226 F.2d 251, 253 (1955); *Bracey* v. *United States*, 79 U.S. App. D.C. 23, 142 F.2d 85, *cert. denied*, 322 U.S. 762 (1944); *Ryan* v. *United States*, 26 App. D.C. 74, 83 (1905)[4]. See generally, McCORMICK, EVIDENCE §§ 153, 155, 157 (1954); 1 WIGMORE, EVIDENCE §§ 193-194 (3d ed. 1940); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 Harv. L. Rev. 426 (1964); Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L. J. 763 (1961). When there is a legitimate purpose for employing such evidence, as here to confirm appellant's sanity and malingering, thereby re-

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should be noted that it has been suggested that the probative worth of other crime evidence rises and, hence, the case for its admissibility becomes stronger as the necessity for its introduction increases, *i.e.* whenever the prosecution has no other available evidence unquestionably sufficient to convince the jury of defendant's guilt beyond a reasonable doubt. See *State* v. *Gilligan*, 92 Conn. 526, 536, 103 Atl. 649, 653 (1918); Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L. J. 763, 771 (1961).

[4] The District of Columbia, until *Harper, supra,* appeared to have adopted what has been termed the "exclusionary" rule, Comment, *Other Crimes Evidence at Trial, supra,* n. 3 at 767, excluding all other crimes evidence except that which fits into certain traditional categories, although as this Court noted in *Fairbanks, supra,* and *Bracey, supra,* it was impossible to determine which was more extensive, the doctrine or the list of exceptions. With *Harper, supra,* however, this Court has moved to the more flexible "inclusionary" rule, including all relevant evidence where relevancy outweighs prejudice. The balancing test has replaced pigeon-holing.

futing his sole defense, the evidence is admitted for its probative qualities regardless of the fact that it may incidentally prejudice a defendant with the jury. *Harper, supra; Bracey, supra.* In this case, the balance is even more lop-sided in favor of admissibility since there was no prosecution-prompted testimony about specific criminal acts performed by appellant which is considered the most prejudicial because most striking and persuasive type of bad character evidence, see McCORMICK, EVIDENCE § 153 (1954), and since the usual disparity between the probative value of such evidence as to only one constituent element of the crime, e.g. intent as in *Harper, supra,* and its prejudicial effect which goes to the entire offense does not exist where both the proof and prejudice focus exclusively on the narrow issue of sanity.

II. The issue of appellant's responsibility for the crimes was properly left to the jury.

(See Tr. 75-78, 82, 84-87, 95-97, 107-108, 123, 136-138, 151-152, 168, 180, 183-185, 196, 199-201, 204, 206, 211, 213-219, 239, 245-246, 249, 255)

Appellant contends that his motion for a directed verdict of not guilty by reason of insanity should have been granted, not denied by the trial court, because the weight of the evidence of his insanity was so overwhelming that a reasonable juror should have been compelled to entertain a reasonable doubt about his responsibility. See the directed verdict standard enunciated in *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 123, 312 F.2d 847, 850 (1962). Appellant produced three expert witnesses from St. Elizabeths Hospital, Drs. Dorothy Dobbs and Charles Aglar, who were staff psychiatrists, and Dr. John Dorriello, a staff clinical psychologist. Two of the three agreed with varying degrees of assuredness that, on the date of the crimes, appellant was suffering from schizophrenic reaction, chronic undifferentiated type (Tr. 75, 123), while Dr. Aglar diagnosed paranoid schizophrenia at the time the charge against appellant was made (Tr. 180). Dr. Dobbs was able to identify positively only one of the five distinguishing features of schizophrenic illness in appellant's case—flattened affect (Tr. 75-76). She merely believed she saw signs of loosened association, found his autism not striking, was not sure whether his claimed hallucinatory experiences were real or fake, and thought his delusions "a bit uncertain" (Tr. 76-77). Dr. Borriello's conclusions on appellant's mental condition were derived second hand from reports on five psychological tests administered to appellant by his intern (Tr. 151-152). Dr. Borriello never personally talked to or observed appellant as far as the record indicates. Dr. Aglar noted that he could be wrong on his diagnosis of appellant's illness (Tr. 206) and pointed out that most paranoid schizophrenics do not behave as appellant had (Tr. 183, 196).

All three expert witnesses for the defense considered the possibility that appellant was malingering, *i.e.* faking symptoms of mental disease. Dr. Dobbs had been concerned about appellant's agreement to having had all dreams mentioned to him, including irrelevant ones (Tr. 84-87), but concluded that, even if he were malingering, he was still mentally ill (Tr. 107-108). She thought that the offenses he committed were products of his mental illness if he was telling the truth when he claimed that he believed Mr. Blumenthal was laughing at him, a belief that triggered his acts (Tr. 78, 82, 94), but admitted that the accuracy of his report of his own state of mind was only probable, not certain (Tr. 78, 84, 87). Dr. Aglar felt that the evidence he had before him was more heavily weighted in the direction of appellant's having been psychotic than having been a malingerer (Tr. 200), although the latter was a possibility. Dr. Aglar, like Dr. Dobbs, relied considerably on appellant's story of his delusion of being laughed at by Mr. Blumenthal (Tr. 204) and noted productivity gradations among the assault on Blumenthal and the subsequent robbery and shooting (Dobbs - Tr. 95-97, Aglar - Tr. 184-185, 199-

200). Dr. Borriello was confident appellant was not malingering (Tr. 136-138, 168).

In opposition the Government offered the testimony of Dr. David Owens, supervisor of all three defense experts as Clinical Director of the John Howard Pavillion (Tr. 85, 211). Dr. Owen's materials for judgment were the same as those of Drs. Aglar and Dobbs—two staff conferences with interviewing and appellant's hospital records, tests, and history. He did not see sufficient signs or symptoms of mental disease in appellant to warrant a diagnosis of mental illness (Tr. 214, 249). He thought that appellant was malingering, a potential schizophrenic rather than an actual one on the crucial date, a fabricator of dreams, hallucinations and suicide attempts (Tr. 213-219, 239, 245-246, 249, 255).

The trial court, therefore, was confronted with a direct conflict of expert testimony on the existence of mental illness in appellant at the time of the offenses, a conflict among doctors working on the same hospital staff under the same observational conditions whose resolution depended upon weight and credibility determinations ordinarily reserved exclusively for the jury. See, *e.g.*, *Barkley* v. *United States*, 116 U.S. App. D.C. 334, 323 F.2d 804 (1963) (evidence of substance looking both ways with split between two psychiatrists as to existence of mental disease; also contradictory lay testimony); *Blocker* v. *United States*, 116 U.S. App. D.C. 78, 320 F.2d 800, *cert. denied*, 375 U.S. 923 (1963) (division among three psychiatrists on mental disease and productivity); *Alexander* v. *United States*, 115 U.S. App. D.C. 303, 318 F.2d 274 (1963) (lay testimony for defense against psychiatrist for Government); *Horton* v. *United States*, 115 U.S. App. D.C. 184, 317 F.2d 595 (1963) (four psychiatrists versus two on existence of mental disease, three of four finding productivity); *Strickland* v. *United States*, 115 U.S. App. D.C. 5, 316 F.2d 656 (1963) (two psychiatrists and one psychologist against two psychiatrists on mental disease, only one psychiatrist finding productivity); *Williams* v.

United States, 114 U.S. App. D.C. 135, 312 F.2d 862 (1962), *cert. denied*, 374 U.S. 841 (1963) (six psychiatrists against five on existence of mental disease, only three finding productivity); *McDonald* v. *United States*, *supra*, (psychiatrist and psychologist uncontradicted); *Campbell* v. *United States*, 113 U.S. App. D.C. 260, 307 F.2d 597 (1962) (two psychiatrists equating emotional instability with mental disease, one denying the equation); *Jones* v. *United States*, 113 U.S. App. D.C. 256, 307 F.2d 397 (1962) (two psychiatrists against one on productivity of mental disease); *Stewart* v. *United States*, 94 U.S. App. D.C. 293, 214 F.2d 879 (1954).

This Court has never seen fit to take the issue of responsibility and hence the case away from the jury when experts collide and has only removed it from the jury when the defense has put on strong expert evidence of serious mental disease with Government rebuttal limited to expert evidence that in no way contradicts the defense psychiatrists by finding sanity on the relevant date, see, *e.g.*, *Isaacs* v. *United States*, 109 U.S. App. D.C. 34, 284 F.2d 168 (1960) (schizophrenic reaction opposed by one lay witness and one psychiatrist who testified to having no basis for an opinion on defendant's mental condition as of the date of the crime); *Satterwhite* v. *United States*, 105 U.S. App. D.C. 398, 267 F.2d 675 (1959) (schizophrenia at time of crime opposed by two lay witnesses and one psychiatrist who testified only as to defendant's condition three months after the crime); *Douglas* v. *United States*, 99 U.S. App. D.C. 232, 239 F.2d 52 (1956) (dementia praecox opposed by psychiatrist who could not state whether paranoid schizophrenia in hospital was present four months earlier at time of crime), or insubstantial lay evidence. See, *e.g.*, *Hopkins* v. *United States*, 107 U.S. App. D.C. 126, 275 F.2d 155 (1959) (schizophrenic reaction opposed by two non-psychiatric doctors among lay men testifying to normality); *Fielding* v. *United States*, 102 U.S. App. D.C. 167, 251 F.2d 878 (1957) (schizophrenia opposed by arresting police officers and defendant's brother and wife who lacked intimate, prolonged contact with him); *Wright* v. *United States*, 102 U.S. App. D.C. 36, 250 F.2d 4 (1957) (schizophrenia opposed by arresting police officers).

In this case, there is no basis whatsoever for judicial discounting of Dr. Owens' testimony compared with that of his three colleagues. Appellant's credibility arguments in his brief were properly made to the jury to aid their assessment of the weight to be given Dr. Owens' opinion. They do not operate to erase his testimony from the record. As long as that expert testimony was in the record, there was no defense proof sufficient to compel a reasonable juror to entertain a reasonable doubt concerning appellant's sanity.

CONCLUSION

Wherefore it is respectfully submitted that the judgment of the District Court be affirmed.

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f Judge Bazelon

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United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 21 1965

Nathan J. Paulson
CLERK

MEMORANDUM OF AMICUS CURIAE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,418

BERNARD C. WHITE,

Appellant

v.

UNITED STATES OF AMERICA

Appellee.

Barbara Allen Babcock
1000 Hill Building
Washington, D. C. 20006

Amicus Curiae

MEMORANDUM

LEONARD WHITE v. UNITED STATES, No. 18,416

By an order of the Court filed April 22, 1965, I was appointed *amicus curiae* to submit a memorandum dealing with four specific issues and considering whether these or similar matters deprived Leonard White of any constitutional rights.

I have talked in the United States Attorney's office with Mr. Nebeker, Mr. Kramer who handled *White* on appeal and Mr. Treanor who was trial prosecutor. They made their files available to me. I have also talked several times with one of the appointed trial counsel for defendant White. Finally, I spent approximately seven hours studying the White file which was provided by Dr. Pluskin at St. Elizabeths Hospital.

On the basis of the above investigation, the first part of this memorandum considers briefly the specific issues which the Court has raised. The second part considers whether the circumstances here amounted to ineffective assistance of counsel or an unfair trial.

THE COURT'S QUESTIONS

1. The Letter From St. Elizabeths Hospital.

Defense counsel found the letter in the criminal jacket and telephoned St. Elizabeths to discover which psychiatrist could testify if the insanity defense were raised. Counsel did not consider introducing the letter.[1] In *Lyles* v. *United States*, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. den. 356 U.S. 961 (1958) five judges held:

> "[T]he admission of a written opinion of a psychiatrist only by the naked record of his recorded conclusions without his being present and with no opportunity to cross-examine as to the foundation of the opinion is plainly unwarranted by the language or the history of the Federal Shop Book Act." 103 U.S.App.D.C. at 28, 254 F.2d at 731.

It is questionable whether *Lyles* applies to a situation where the psychiatrists appear as witnesses. This question aside, *Lyles* applies only to cases where the psychiatric opinion is admitted for the truth of its content. Here the

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[1] Interview May 5, 1968 with appointed trial counsel.

letter could have been introduced for other purposes. The prosecutor sought to impeach a defense psychiatrist by asking whether her opinion was countered by that of her supervisor Dr. Owens, Tr. 85. The inference sought was that Dr. Owens' opinion was more trustworthy because of his superior position. When Dr. Owens took the stand, the prosecutor brought out that he was the "supervisor or superior" of the defense witness. See Tr. 211. Thus, either in re-direct examination of the defense psychiatrist or in cross-examination of Dr. Owens, the letter would have been relevant to show that the official St. Elizabeths' diagnosis is based on a majority vote of psychiatrists with no special weight or worth attached to the supervisor's opinion.

2. Bernard White's Institutional Record. White's record of incarceration is not available in one place. But when the records of the Metropolitan Police Department are combined with the Federal Bureau of Investigation report and with the records from Lewisburg Federal Penitentiary, a chronology can be established. Records from the Industrial Home School, the National Training School for Boys, Petersburg

Penitentiary and Lorton Penitentiary are not in the United States Attorney's or the St. Elizabeths' files. The Lewisburg Penitentiary classification study is based partly on records from these institutions, however, and gives some idea of what they contain. There is no indication in the records available of diagnosis or treatment for mental illness. The records that are available, however, indicate a history of maladjustment and serious psychiatric difficulties. Such information is recounted in Bernard White's history, Part 2 of this memorandum.

BERNARD WHITE'S INSTITUTIONAL RECORD

Date	Offense
1939	Reported to Public Welfare Department Virginia as "fugitive from his parents."
1943	Beaumont School for Boys. (This information does not appear on official records, but White told several interviewers that he had been incarcerated here).
1944 - August 1947 (absconded four times during this three-year period.)	Juvenile delinquent, unmanageable by his parents. Committed to Industrial Home School August 8, 1944.
September 20, 1948 through 1950 (absconded three times)	Juvenile delinquent. Re-incarcerated in the Industrial Home School.
August 2, 1950	Juvenile delinquent. Committed to the National Training School for Boys. Paroled July 1951.
December 1951	Parole violator. Juvenile delinquent beyond control. Transferred from National Training School to Federal Penitentiary, Petersburg, Virginia. Released August 17, 1954.
October 28, 1954	Warrant issued as failing to respond to supervision. Case closed a year later because White had reached the age of 21.

Date	Offense
May 6, 1956	Arrested in D.C., charged with thirty cases of housebreaking; pleaded guilty.
August 29, 1956	Admitted to D. C. General Hospital on motion for mental examination.
October, 1956	Sentenced three to ten years, Lorton Penitentiary.
June 3, 1958	Transferred from Lorton to the Federal Penitentiary at Lewisburg, Pennsylvania. Paroled December 3, 1962.
April, 1963	Arrested for robbery, assault with a dangerous weapon, carrying a dangerous weapon.
June 14, 1963	Committed to St. Elizabeths' for a 90-day mental examination.
January 17, 1964	Sentenced two to six years, Lorton Penitentiary.

3. <u>The Judge's recommendation</u>. It is not likely that the sentencing judge had before him information significantly more extensive than that included in the St. Elizabeths' file. That file contains a very full pre-sentence report on White from 1956 and the excellent Lewisburg Penitentiary classification study which covers his history from 1958 until his parole in December 1962. By April 1963 he was again in custody and the St. Elizabeths' file contains several interviews and psychiatric studies of White over the next two years. The St. Elizabeths' file offers a complete foundation for the trial court's "urgent recommendation". The <u>amicus</u> thus did not seek the 1963 pre-sentence report.

4. <u>Failure to Subpoena the Wife</u>. The St. Elizabeths' file contains a rather extensive interview by a social worker with Lenore White. Nothing in it indicates that she is a particularly or even normally perceptive person who has given much thought to her husband's mental condition. The incidents she volunteered indicated, however, that had she been closely

examined on the events of her life with Bernard White, valuable testimony on insanity might well have emerged. Her address was apparently available from the St. Elizabeths' files at the time this case came to trial.

It appeared in an interview with assigned defense trial counsel, however, that it had not occurred to him to call the wife or any other lay witnesses to testify to Bernard White's mental condition.

II

The trial transcript in <u>United States</u> v. <u>White</u> has a curious flatness, leaving the reader with few explanations. What exactly was White's background and institutional history? Didn't anyone think to call White's wife or other lay witnesses to aid in the insanity defense? Is there some reason that it took the jury less than three hours[2] to discount the insanity defense while the sentencing judge urgently recommended psychiatric care? The Court's specific questions in its April 22nd Order Appointing Amicus were directed to such peculiar gaps and difficulties in this record. To aid in the assessment of these difficulties, there follows a connected account of Bernard White's history, based on the records in the St. Elizabeths' file.

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[1] The jury retired to deliberate at 12:00 and returned its verdict at 3:15 p.m., presumably part of this period was spent at lunch.

Welfare agencies, mental hospitals, and prisons are alike in that they must classify a case in order to handle it. Bernard White is a man of many labels. The first was "fugitive from his parents" at age 5. His father was a laborer married to his former housekeeper, a woman reportedly promiscuous and alcoholic. Bernard White's mother had died in giving birth to him, the youngest of seven children. At nine, White was once more "fugitive" and was placed in his first correctional school, Beaumont School for Boys, Beaumont, Virginia for a year. In his early school days, he was a constant enuretic problem and appeared "undernourished, sleepy and rundown."

Shortly after leaving the Beaumont School, he came to the District of Columbia, where as a result of thievery and housebreaking, he was classified a "juvenile delinquent beyond the control of his parents." The Juvenile Court committed him to the Industrial Home School on August 8, 1944. He was then ten years old. In his first three years at this school, White "absconded" four times. In August 1947, he

was released to his sister and her husband in Virginia. A year later, at the age of fourteen, he was "involved" in breaking and entering and was returned to the Industrial Home School. He remained at the Industrial Home School for two years this time during which he absconded three times.

Industrial Home School records describe White as "quick-tempered with great feelings of inadequacy" and "unable to accept his family's rejection." As he became older, he grew increasingly aggressive and intimidated and hurt weaker boys.

During one of his escapes from the Industrial Home School in 1948 White was caught breaking and entering. White was "beyond control" of the Industrial Home School. After his last escape in June 1950, he was committed to the National Training School for Boys. There his initial adjustment was poor. He did, however, improve and began learning the skill of house painting. In July of 1951, at the age of seventeen, he was paroled from the National Training School. By December, he had violated his parole by failing to find steady work,

changing his residence without notifying the parole officer and being caught in petty theft from a department store. When he was arrested as a parole violator he was placed for a short time in a receiving home. There he abused a younger boy and when reprimanded did considerable physical damage to the home. The Juvenile Court returned him to the National Training School where he again made a poor adjustment. Because of his physical abuse of younger boys, he was transferred to the Federal Reformatory in Petersburg,Virginia, in January 1952. Classified as requiring "close custody" at Petersburg, White was at first a serious disciplinary problem but eventually adjusted. Petersburg records show that he could be an outstanding worker at manual tasks but that with no apparent reason, he would suddenly become despondent and dangerous to those around him.

When White was released on parole in 1954, a Metropolitan police officer, Mr. Rogers, took an interest in this 20-year old youth who had never had a home. Rogers brought White into his family. The records do not indicate

what happened to this experiment. White told a St. Elizabeths psychiatrist that his "father" was a policeman. (White's actual father was a railroad and construction worker.)

Apparently, White left the Rogers' home to move to Philadelphia to live with Joseph Wright, a former fellow student at the Industrial Home School. Wright and his family were inveterate thieves. In partnership with Wright, Bernard White resumed his housebreaking career on a major scale. The two returned to the District of Columbia, probably sometime in 1955, and were arrested in 1956 and accused of more than thirty cases of housebreaking. Five such cases were presented to the grand jury. Both defendants pleaded guilty as charged. The pre-sentence report said that there was substantial evidence against White in 53 housebreaking cases. White himself once said he had been involved in more than 300 larcenies.

White's lawyer moved for a mental examination. This lawyer told the pre-sentence investigator that he was shocked

by the depth of White's hostility against everyone and especially his own father who was by this time dead. D.C. General Hospital reported White as "not psychotic." Dr. Schultz of D.C. General told the pre-sentence investigator, however, that White was a dangerous and largely incorrigible young man with a violent nature and strong suicidal tendencies. At this, his first recorded meeting with a psychiatrist, White explained that he had never received any substantial profit from housebreaking, he just liked to force his way into other people's houses. He said he did it for enjoyment. Dr. Schultz felt that White could not be helped by any ordinary efforts to aid him.

White told the pre-sentence investigator that he had been in jail 15 years for no apparent reason and that he would not go back. He said if he received a heavy sentence he would cheat the law by committing suicide. The pre-sentence investigator noted, on his own, White's unusual and violent hostility against all authority. The pre-sentence report on White in 1956 classified him as having a "poor prognosis for

societal adjustment."

White was sentenced to Lorton Penitentiary for 3 to 10 years and began serving sentence on August 30, 1956. No records are available in the St. Elizabeths' file from Lorton. It appears in other records, however, that he was disciplined several times and that he threatened employees and other inmates. He was also apparently taken into special custody as a suspect in the murder of a prison employee.

On June 3, 1958, he was transferred for "institutional adjustment" from Lorton to the Federal Penitentiary in Lewisburg, Pennsylvania. Initially he was kept in close custody at Lewisburg. The classification study from Lewisburg relates that after he had been there only a few days he claimed that other inmates were threatening him. White was this time classified as having "guarded prognosis for adjustment."

But after an initial period of disciplinary difficulties, White made some adjustment in Lewisburg. He

took several high school courses and was a good manual laborer. The only plan for the future that he ever revealed was to go to Alaska and find work as a mechanic. When he was paroled on December 3, 1962, however, he returned to the District of Columbia where he lived at liberty for 16 months.

During the last three of these months, White was married to a young woman whom he had known at the Industrial Home School. It was a tempestuous married life which included two suicidal gestures by White and a scene in a restaurant in which he threw a friend across a floor over some minor disagreement. The social worker who interviewed Lenore White reported that she is an immature, inadequate girl unable to offer emotional support to another person.

On April 1963, White learned that Lenore had gone out with a sixty-year-old man and assumed they were having sexual relations. He took a gun and went to find them. As he walked down Pennsylvania Avenue, he saw an old man in a store. It seemed to White that the man was laughing at him.

Without word or warning, White entered the store, brutally pistol whipped the man, and took $20 in small bills from the cash register. He fled, turning once to fire at a pursuer.

White was arrested the same night and taken to the D.C. Jail. While there, he cut his arms in what was either a suicidal gesture or suicidal attempt. Assigned counsel moved for a mental examination on the ground that during an interview White had "exhibited bizarre, irrational and totally disassociated thinking; he continually mumbled, smiled, and talked to himself . . . Counsel was unable to gain assistance in any way from the defendant in the preparation of a defense to the present charges."

Admitted to St. Elizabeths by court order for a 90-day examination, White was almost immediately placed on unusually large daily dosages of tranquilizers. The nursing notes nevertheless record that he was excessively restless, pacing the floor and beating on the walls. At one point,

he was transferred within the John Howard Pavilion because he felt "persecuted and closed in."

At the medical staff conference, "he stated that he hates all people, has never had any friends." He also said that there "has never been anyome he has ever been able to get along with." He described intense, pleasurable sensations from seeing another person in pain and repeated what he had told the doctors at D.C. General in 1956: that he could* often find emotional relief only in assaulting other people. There was disagreement in the staff conference as to White's mental condition, with two of the staff psychiatrists and a resident intern in psychiatry saying that he was schizophrenic. Dr. Owens, however, held that he was malingering. In accordance with St. Elizabeths practice, the majority opinion prevailed and White was classified as "schizophrenic, chronic, undifferentiated type."

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* In this connection, it should be noted that since White was sentenced in January 1964, he has spent seven months from May to December 1964 in St. Elizabeths. After four months in Lorton Penitentiary he complained of feeling crowded, having nightmares of violence and killing, and sensing that he would again attack some innocent person. He was examined in prison by the Legal Psychiatric Service which certified that he was psychotic. White was re-admitted to St. Elizabeths under the diagnosis of schizophrenic. He was discharged seven months later, as improved.

When the information available about Bernard White is compared to what the jury heard, it is apparent that there was here a failure of presentation. Fundamental to this failure was the fact that counsel left the defense almost entirely to the psychiatrists. He had not studied the records available to him in the St. Elizabeths' file[3/] and was thus unable to use them effectively. His entire approach to this case, which he stated in his remarks to the jury, (Tr. 67, 283), was that insanity is a matter for the experts. Cf. Whalem v. United States, No. 18,067 (decided April 23, 1965), Slip Opinion pp. 21-22.

It is clear from the record that defense counsel talked to the witnesses beforehand, but did not prepare them intensively, that he depended on them as experts without spending long hours in study himself. He followed, in short,

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[3/] The trial transcript reveals that defense counsel made no such study, as the analysis of that record, infra shows. Defense counsel stated, moreover, in an interview June 17, 1965 that he had not felt it necessary to subpoena or study the records himself. According to the St. Elizabeths' records, government counsel subpoened the file on November 19, 1963, the day before the trial.

the usual course in assigned cases. "The Bar has responded beyond the call of duty and good will" to a situation in which "there are a great number of indigent defendants and relatively few lawyers familiar with criminal trial practice." "But how much preparation in depth can we expect under such circumstances"? Jackson v. United States, 118 U.S.App.D.C. 341, 347, 347 F.2d 579, 585 (1964) (separate opinion).[4/]

[4/] In Jackson, the defendant wanted to raise the insanity defense on the basis of a long-time addiction to drugs. St. Elizabeths had reported him without mental illness. His lawyer knew nothing of the mental examination until the day of the trial. (As in the instant case, the lawyer was the last of several appointed in the District Court.) But the St. Elizabeths' doctors were called on the spur of the moment and a make-shift insanity defense raised. Judge Bazelon concluded in Jackson that such partial presentation resulted from the inadequacies of a system in which the doctors at public institutions often do not have the resources to make a complete examination and in which there is no criminal bar trained in the presentation of the insanity defense. Bernard White's case is similar to Jackson's -- less aggravated because there was a systematic attempt to present White's insanity defense -- more aggravated because in spite of the good-faith effort to present the defense, limits within the system made that presentation inadequate.

No matter how this most difficult question is answered generally, Bernard White's case indicates that there must be "preparation in depth" when insanity is raised. In this jurisdiction, the defense requires the fullest exploration of the defendant's background and mental processes.[5/] This has not proved a task which can realistically be expected of counsel appointed in the ordinary course. See e.g. Simpson

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[5/] "Thus the jury would consider testimony concerning the development, adaptation and functioning of [mental or emotional processes and behavior controls]"

McDonald v. United States, 114 U.S.App.D.C. 120, 124 312 F.2d 847 (1962).

> "Mental abnormalities vary infinitely in their nature and intensity and in their effects on the character and conduct of those who suffer from them . . . [T]he closeness of this connection will be shown by the facts brought in evidence in individual cases and cannot be decided on the basis of any general medical principle."

Blocker v. United States, 107 U.S.App.D.C. 63, 64 274 F.2d 572 573 (1959) (en banc) quoting Royal Commission a Capital Punishment 1949-1953 Report (Cmd 8932 99) (1953), originally quoted in Durham v. United States, 94 U.S.App.D.C. 228, 241, 214 F.2d 862, 875 (1954). See Carter v. United States, 252 F.2d 608 (1957).

v. United States, 116 U.S.App.D.C. 81,320 F.2d 803 (1963) (concurring opinion); Rollerson v. United States, No. 17675 (decided October 1, 1964); Jackson v. United States, supra.

Accordingly, this Court in the exercise of its supervisory power over the administration of criminal justice in the District of Columbia should direct special procedures in cases where the insanity defense is to be raised and counsel is appointed. When in the course of the preparation of a case, it becomes likely that insanity will be an issue, counsel should so inform the District Court. If the lawyer is not one who has had significant experience with the insanity defense, the Court should appoint a second attorney from the ranks of those who have had such experience. If counsel is experienced on insanity cases, an assistant lawyer should be appointed who has not had such experience. The two lawyers should then work together in preparing and presenting the case.[6] Thus, the

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[6] The Criminal Justice Act of 1964, Public Law 88-455 passed August 20, 1964, 18 U.S.C. 3006(a) provides some compensation for appointed counsel. The Act speaks of payments to attorneys rather than for cases. Thus, there is no reason that two attorneys cannot be appointed and compensated in the same case.

process will begin of building a bar skilled in presenting the insanity defense.

The nature of the problem which calls for such action by this court becomes clearer upon analysis of the record in this case.

Counsel's Lack of Familiarity with the Records.

Not even a bare outline of Bernard White's institutional history was ever presented to the jury. They were unaware of what institutions he had been in and of any of the history of his adjustment in the institutions. The complete testimony is set out to give an example of the record's flatness on this and other points.

ON DIRECT EXAMINATION OF DEFENSE PSYCHIATRISTS:

> He discussed with us many of his prior difficulties which had led to his being locked up in various institutions almost all of his life, from the age of ten, I believe it is.
>
> Tr. 73, Dr. Dobbs.

> He was in a great deal of trouble as a child and he was under the jurisdiction of the Department of the Public Welfare in 1944, when he was only 10 years old, because he was a juvenile from his parents. (sic)

And he was subsequently incarcerated in an industrial home school for three years. After his release from there, he was in various institutions for a large part of his life, up until now, because of car stealing and other types of theft.

There at the institutions where he stayed, he made a very poor adjustment, and as a boy, he was noted to be rather tense, a poor student, and he had trouble getting along with other boys:

Tr. 178-9 Dr. Agler

ON CROSS-EXAMINATION OF DEFENSE PSYCHIATRISTS

Q. You mentioned you took into consideration in arriving at your opinion that Bernard White had spent most of his life in institutions.

A. Yes.

* * * *

A. He was first sent away to an institution, as I understand it, because of a lack of adequate parental care.

* * * *

Q. And you said he did spend most of his younger days until recently incarcerated or in an institution.

A. Yes.

Q. Were any of these institutions mental institutions?

A. I believe once briefly he was evaluated in D.C. General . . . I believe this was in 1956 he was examined there. For what period of time I don't know. Again, the report is secondhand. Described as quote not psychotic.

Tr. 87-89 Dr. Dobbs.

. . . this is not the first person I ever met who came from a broken home and had been locked up once or twice. Tr. 100 Dr. Dobbs.

Q. Now, you are aware, aren't you, Doctor, that this man has spent a considerable period of time incarcerated in institutions?

A. Yes.

Q. First, are you aware of any treatment that he received during the course of those some 18 years, roughly, that was of a psychiatric nature?

A. I don't believe that he ever, I could be wrong, I am not certain, but I don't believe that he ever received any extensive degree of psychotherapy. He probably received treatment of whatever nature they have, which is usually of no use, therapy, if that much.

Q. And do you know for a fact if the question ever came up during that long period?

A. Well, that is rather problematical. It may not have come up even though it would be or it was necessary.

Q. My question is, Doctor, do you know of any specific instance where the question of this man's insanity or insanity ever came up prior to his arrival at your institution?

A. I don't know of any such instance, although it may have occurred. I can't answer with an absolute yes or no.

Q. You know of none?

A. That is right.

Q. And you did, at the time of your examination, have available to you the reports and so on from these various institutions, didn't you?

A. Yes.

Q. Now, would it be fair, then, to say, I hope this isn't repetitive, this is the first time, as far as you know, of him finding himself in difficulties with the law, this defendant has received any psychiatric treatment, as far as you know?

A. As far as I know, that is correct.

. . . And I think it's poor adjustments in the institutions that he was cared for show he probably had been ill for a long time.

Tr. 189, Dr. Agler.

And any child might wander off occasionally, might just be gone on a lark, but I feel fairly certain that wasn't the circumstances that led him to be placed in an institution outside of the family.

Q. All right, what else during his young life led you to believe he has been suffering from this disease?

A. His poor behavior at the institutions and the fact that he had enuresis.

* * * *

> Q. What does the record indicate about his getting along in these institutions?
>
> A. He was considered tense, a poor student, and not getting on well with the other fellows, and he bulleyed the younger or the smaller fellows, which is also a symptom of a severe emotional disturbance in some cases.
>
> Tr. 191-2, Dr. Agler.

This is the total information in the record, most of it brought out on cross-examination, about the institutional record, which is in effect the life history of Bernard White. What was presented was not only sketchy and off-hand, but inexact. Dr. Agler, for instance, testified that White was in the Industrial Home School for three years when he was there for five. His "poor adjustment" was referred to, but no mention was made of the fact that the records show that he absconded at least seven times from the Industrial Home School, nor was it mentioned that his poor adjustment finally resulted in his transfer to the National Training School and from there, while still a juvenile, to a federal penitentiary.

It was said that he bullied smaller boys, but not pointed out that this was responsible for his transfer from institution to institution. In every institution he was felt to be dangerous to others. Twice in adult institutions he was assigned to "close custody."

The logical explanation for the haziness of the testimony as to White's background is that defense counsel was not familiar with the St. Elizabeths' file on White. He had not himself studied it to select what points should be emphasized, what examples definitely should have been presented to the jury. He had not carefully prepared the psychiatrists on the basis of his own study of the record, in order that their answers might be directed to specific examples and exact information. That defense counsel had never studied the records himself is a far likelier conclusion than that he did not know how to prepare the witnesses or would not have been able to formulate the proper questions.

If there had at least been some testimony about all aspects of White's institutional record, defense counsel in his closing argument could have given the jury a coherent and

convincing account of how it happened that Bernard White failed to develop behavior controls.[7/] As it was, the total reference in defense counsel's closing argument to White's institutional record was:

> This man from the tender age of four, has been without many things. I don't suggest to you to excuse his behavior, but I think it should be kept in mind that from the tender age of four he was taken from his parents who were not able to care for him and he was without proper parental control. Tr. 205.

Lack of familiarity with the records also limited defense counsel's ability to meet the prosecutor's interpretations of that record made during cross-examination. Dr. Agler, for instance, was asked two questions along these lines:

[I]n some of these institutions he did pretty well . . .

* * * *

[7/] Only by studying the records for several hours can a coherent picture of White's life be drawn together. No single report or record accurately presents his life history.

> . . . Does the record also seem to indicate, Doctor, that whenever he was given a job that involved the use of his hands, a manual sort of thing in a garage or as a dishwasher, doesn't the record indicate he did pretty well? Tr. 193.

The doctor answered that he believed so. Actually, however, this is a matter of interpretation which could have, and indeed should have, been countered. The Lewisburg classification study is the only actual prison, or institutional record available. That study was based partially on records from other institutions which do not indicate that White made a generally good adjustment anywhere. He was disciplined many times. He was considered dangerous to others. He was transferred from institution to institution. Thus, re-direct examination could have brought out both that the complete records were not available and that the records available did not, after all, establish White as a model prisoner.

Finally, a close working knowledge of the records would have allowed counsel to draw together isolated facts for the jury, to present further hypotheticals in questioning the defense psychiatrists and generally to buttress the insanity defense. The records show for instance, that from an early

age White's chief emotional release was brutality and violence toward others. In 1956 White explained to a psychiatrist at D.C. General Hospital that he felt better if he could physically beat another person. Assaults on fellow inmates were a common-place of White's institutional record. On the day of the crime, White's hostility and anger toward his wife reached a peak and he followed his <u>usual pattern</u> by viciously assaulting an innocent person. Moreover, White attacked an old man on a day when his wife was out with an old man.

It is not suggested that this is necessarily the psychiatric explanation of White's crime, or even that this view had necessarily to be put before the jury. But this is an example of the sort of connection which counsel could have made specifically in his closing or in his questions, if he had had the painstaking familiarity with the records necessary for effective presentation of the insanity defense.

Such familiarity with the records would also have equipped defense counsel to meet the prosecution's theory of

the case which can be summed in one question on cross-examination to Dr. Dobbs:[8]

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[8] It was the prosecution's theory that Bernard White is "just plain mean without being sick." Tr. 219. The absence of any acts which the man in the street would recognize as those of a mad-man was part of this theory. This exchange occurred in the final sequence of questions to the government psychiatrist.

> Q. "Now, Doctor, if you were at a cocktail party tonight and you did talk of Bernard White as you know him in layman's terms, what sort of man would you describe him to be? . . .
>
> A. . . . I think he is an individual who certainly has had a difficult life, for some reason which I am unaware of, but at least we know that he is a very hostile, a very angry individual who apparently doesn't want to work for a living and support himself, and that it is easier to do otherwise. Tr. 219.

In closing, the prosecutor said:

> There are in the world some things that are right and some things that are wrong . . . But all the government asks of you is that you use a plausible, common-sense approach to this matter; that approach being that in April, 1963, to go over it again, this man was not doing a bizarre act, he wasn't insane, he was at that instant a criminal breaking the law." Tr. 290.

See also Tr. 287-288.

> Q. Do you have any knowledge, Doctor, of anything White ever did that was responsible for him being incarcerated that was of an unusual, bizarre nature? For instance, jumping off a flag pole, or anything unusual other than the ordinary hostile activity?
>
> A. "I don't know of anything quite so flagrantly bizarre as the illustration you gave, no." Tr. 89.

This opened the door on re-direct examination for defense counsel to aid the doctor in explaining to the jury both the meaning of "bizarre" or "unusual" and the point at which "ordinary hostile activity" becomes "bizarre." Thus, close familiarity with the records would have inspired the formulation of a series of questions such as:

> Doctor, would you consider it bizarre to steal not for profit, but for the pleasure of breaking into other people's houses and seeing their things and destroying them?
>
> Doctor, would you consider it ordinary hostility to respond to a verbal reprimand by physically wrecking an institution in which you are temporarily staying?
>
> Doctor, is it bizarre behavior to "mumble incoherently, smile without reason and talk to oneself?"
>
> Doctor, would you consider it bizarre, or unusual to express one's emotions by violent attacks upon innocent people?

> Would you consider it unusual to think that others are constantly threatening you?
>
> Would you consider it unusual or bizarre for a person to say that he had never gotten along with anyone else in his whole life?

But there was no re-direct examination along these lines and the prosecutor continued to argue through his questions and in his closing that Bernard White is "just plain mean."

One reason that it is important to have specific information in the record is that instructions can then be tailored to this testimony and the jury materially aided in its deliberations. Here the court asked counsel to submit requested instructions.[9] The defense submitted only a request for the Lyles instruction. Thus the jury was left with the

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[9] At a bench conference on the second day of trial, the court said:

> The Court: This is a case of a defense of insanity and we know there is quite a body of law on insanity and that it is a developing matter that has been subject to judicial decisions in quite recent years for some time.
>
> The Court will instruct on it . . . However, I wish to give you an opportunity if you care to do so, to proffer any instructions that you desire to proffer and the Court will, of course, consider any proffer that you wish to make . . . (Tr. 117-118).

judge's unspecific form-book explanation of "mental disease or defect." If defense counsel had been thoroughly familiar with the records and the testimony of the doctors he could have prepared and submitted many tailored instructions along such lines as this.

> You have heard Dr. Dobbs and Dr. Agler testify that the defendant is mentally ill and that his illness sometimes causes him to assault other people in order to relieve his emotions. If you believe this testimony and if you believe that the assault upon Louis Blumenthal resulted from Bernard White's illness, you must find this defendant not guilty by reason of insanity.

Defense Counsel's Misconception of the Law.

> "What psychiatrists may consider a 'mental disease or defect' for clinical purposes where their concern is treatment may or may not be the same as mental disease or defect for the jury purpose in determining criminal responsibility."

The jury "cannot be controlled by expert opinion." McDonald v. United States, 114 U.S.App.D.C. 120, 124 312 F.2d 847, 851 (1962) (en banc). In fact, the jury is free to reject altogether expert opinions if it considers that they have no proper basis. Jenkins v. United States, 113 U.S.App.D.C. 300,

307 F.2d 637 (1962) (en banc); See Rollerson v. United States, No. 17675, decided October 1, 1964. The jury may even rest its verdict on lay testimony as to insanity and disregard expert testimony as to sanity.

It appears throughout this record that defense counsel misunderstood this approach. He clearly felt and indeed clearly said that insanity is a matter for the experts. Thus in his opening, counsel remarked:

> It is our position at the time this offense occurred on April 18, that Mr. White was a sick man mentally and that this offense was related to this sickness.
>
> I don't know whether you ladies and gentlemen have sat on criminal juries before where there has been such testimony. For my part it has always been a little bit above me, psychiatrists and what have you. I think it takes very close attention and very fine consideration by all of you of the testimony that these doctors will give you on this issue. Tr. 67.

In closing he repeated that as to the psychiatric testimony:

> "I am not qualified to substitute my opinion for the doctors' and neither are you. We are not trained in these fields." Tr. 283.

The view that insanity is for the experts probably had a great deal to do with counsel's lack of intensive preparation on the records available to him and with his failure fully to prepare the doctors.

As important as the proper use and preparation of expert testimony is the seeking out and presentation of lay witnesses. See _Naples_ v. _United States_, No. 18, 186 (decided Nov. 9, 1964) slip opinion pages 13 and 14; _Carter_ v. _United States_, _supra_. Here the records available in St. Elizabeths held many possibilities for lay testimony. But no such witnesses were subpoened. White had sisters and brothers, one of whom he had lived with at times. Some of them might have had valuable information. Mr. Rogers, a Metropolitan police officer who took White into his home, possibly had important material to present. Dr. Schultz at D.C. General had been on record in 1956 as having made efforts to help him and as being greatly concerned for White's future. A thorough investigation would possibly have discovered teachers in the Industrial Home School and the National Training School who remembered White and whose

observations would have been valuable.

Then, of course, there is White's wife who as noted pp. 7-8 supra. might have had valuable information on White's mental condition. An interview with the wife, moreover, could have provided important rebuttal testimony to Dr. Owens, the government psychiatrist. Dr. Owens gave as one of his major reasons for believing that White was malingering the conflict between White's story of alienation from the world and his wife's protestation that White had always been good to her and put her on a pedestal. Tr. 218. Dr. Owens had not talked to Lenore White himself. If defense counsel had interviewed her, he might well have found that there was after all a considerable area in which Bernard and Lenore White's stories did not conflict.

There were, in addition, records not in the St. Elizabeths' file which could have been inspected by assigned defense counsel at the Industrial Home School, the National Training School, D.C. General Hospital and Lorton Penitentiary. Investigation of these records would have given

defense counsel an arsenal of information not in the hands of the prosecutor.

Defense counsel twice said in effect that the insanity defense must be left to the experts, and he failed to develop and prepare the full range of testimony which should have been available both from the experts and from lay witnesses. On this record the Court would be justified in assuming a causal connection between counsel's misunderstanding of the law and his failure fully to develop the insanity defense. But again, this was not the failure of an individual lawyer, but of a system which has treated the insanity defense as requiring only the usual time and effort for preparation and presentation.

Barbara Allen Babcock